Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

REGINALD PALMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Fed. R. Crim. P. 32 and § 6A1.3 Sentencing Guidelines allow an appellate court, as a matter of due process, to make a factual finding as to drug quantity *sua sponte* and with no explanation as to its rationale for its finding, where the drug quantity estimates were based on conflicting, inconsistent and uncorroborated testimony of addict informant witnesses, and the district court made no finding as to their credibility or the reliability of the testimony.

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Petitioner, Reginald Palmer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") A, *infra*, pp. 1a-6a) is reported at 248 F.3d 569.

STATEMENT OF JURISDICTION

The initial judgment of the court of appeals was entered on March 27, 2001. The judgment of the court of appeals on rehearing was entered on September 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 32(c)(1) of the Federal Rules of Criminal Procedure, titled "Sentence," provides, in pertinent part:

> (1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into

> account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

Section 6A1.3(a) and (b) of the United States Sentencing Commission, *Guidelines Manual* (Nov. 2001), titled "Resolution of Disputed Factors (Policy Statement)," provides, in pertinent part:

> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
>
> (b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

STATEMENT OF THE CASE

On April 25, 2000, defendant-appellant Reginald Palmer entered a plea of guilty for distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 860. Following the guilty plea, a Pre-Sentence Investigation Report ("PSR") was prepared, and the government relied on that report at Palmer's July 24, 2000 sentencing hearing.

The government's case at the sentencing hearing relied on the testimony of three witnesses. The first witness was Keenan Deal ("Deal"), a government informant and admitted addict. (App. B, p. 12a.) Deal made the controlled purchases which resulted in Palmer's indictment. Deal testified to these controlled purchases which amounted to 4.7 grams (App. B, p. 9a). The remainder of Deal's testimony conflicted with his statements in the PSR.

In the PSR, Deal stated that he "observed Palmer in possession of crack cocaine a total of six or seven times . . . [o]n each occasion [Palmer] was reportedly in possession of a plastic bag containing at least ten rocks. . . ." On the basis of Deal's statement, .1 grams was assigned to each of the 10 "rocks" per plastic bag, and the one gram total was multiplied by six incidents to arrive at a total of six grams. Deal never testified to this amount at the sentencing hearing. Further, in the PSR, Deal estimated that he saw an ounce of crack cocaine on these occasions during the relevant time period: May 4, 1998, May 27, 1998, and again on June 25, 1998. (PSR, p. 4, ¶¶ 7, 9; p. 5, ¶ 12.) However, at the hearing, Deal testified that on May 27 he could not estimate the quantity of drugs in Palmer's possession. (App. B, p. 11a.) Moreover, Deal estimated that Palmer possessed one half ounce on June 25, 1998 in direct contradiction of his PSR statement.

The government also relied on the testimony of Robert Lee Branscomb ("Branscomb"), an admitted heroin addict. (App. B, p. 14a-15a). In the PSR, Branscomb stated that Palmer had cooked approximately one-half ounce of crack cocaine while living with him at the Alta Sita Plaza Apartments. Based on this information, the PSR attributed to Palmer the possession of 14.17 grams of cocaine. (PSR 6) However, when Branscomb testified at the sentencing

hearing, he estimated that Palmer had "less than a quarter of an ounce," before finally admitting he was "not sure" of the specific amount. (App. B, p. 13a.)

Finally, the government relied on the testimony of Warren Griffin, who refused to testify at the hearing. Deputy Sean Newlin testified to the amounts Griffin had allegedly seen in Palmer's possession. Based on Griffin's testimony, 241 grams of cocaine was attributed to Palmer.

Upon hearing the testimony, the district court judge found that there was a "substantial rational basis for attributing more than 150 grams to the defendant."[1] In his decision, the judge particularly pointed to Griffin's testimony as reliable, but made no factual findings as to the other two witnesses. (App. B, p. 16a) After adding five other additional points and adopting the PSR's criminal history rating of V, the judge then sentenced Palmer to 475 months in prison based on the three counts alleging violations of 21 U.S.C. § 860. Although the judge clearly stated that he was not prepared to accept the government's calculation of 353.2 grams of cocaine attributed to Palmer in the PSR, he adopted the PSR without comment in the Sentencing Memorandum and Statement of Reasons. (App. C, p. 18a.)

On appeal to the Seventh Circuit, Palmer argued that the district court failed to properly scrutinize the testimony of Deal and Branscomb, both admitted drug addicts, and improperly relied upon Griffin's testimony at sentencing. The Seventh Circuit, in its March 27, 2001 order, vacated Palmer's sentence based on the fact that the lower court

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1. This drug range translates to a base offense level of 34 under the Sentencing Guidelines. U.S.S.G. § 2D1.2.

improperly considered 241 grams of crack cocaine as part of Palmer's relevant conduct in its sentence calculation. (App. A, pp. 1a-6a.) The panel then stated that the amount of drugs to which Deal and Branscomb testified was "supportable by the record," with no explanation as to its finding and despite the fact that the lower court made no factual finding as to the reliability of the amounts to which the two testified nor as to the credibility of the two men.

Palmer petitioned for re-hearing, alleging that the Seventh Circuit made a fact finding determination in contravention of its prior holdings. The petition for rehearing was denied. (App. D, p. 19a-20a.)[2]

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2. At resentencing, the inconsistencies in Deal's and Branscomb's testimony were raised again before the district court judge. (App. E, pp. 22a-23a) However, the judge, though noting the serious nature of the issues raised, stated that it was bound by the Seventh Circuit's decision. (*Id.*) In commenting on the reliability of the witnesses the lower court stated:

> I always give the example that we could take any of these people that were involved in this case . . . [i]f they came to your front door and said, I want to sell you a vacuum cleaner, they would be shot on sight because they're unreliable . . . [y]ou'd shoot 'em on sight. . . . But to say somebody is and isn't reliable is quite beside the point."

(App. E, pp. 23a-24a [resent tr. 6-7]) Continuing further, Judge Murphy stated "the personalities that are involved [in a particular case] can hardly be said to be reliable at least in the sense that that's ordinarily understood." (App E, pp. 24a-25a [resent tr. 10]). After making the above statements, the judge sentenced Palmer to 405 months in prison.

REASONS FOR GRANTING THE WRIT

At issue is whether an appellate court should be allowed to make a factual finding necessary to support a sentencing calculation. By holding that the amounts credited to Deal's and Branscomb's testimony were "supportable" by the record, while applying a clearly erroneous standard to the district court's findings at sentencing, the Seventh Circuit has ventured into making determinations that have traditionally been the province of the trial court, without making, or having the benefit of the trial court make, a finding as to the credibility of the witnesses or the reliability of the estimates of drug quantity. Such a venture is erroneous, sets a precedent that severely hampers a defendant's due process rights, and contravenes sound and longstanding jurisprudence both in the Seventh Circuit and other circuits.

In the civil context, this Court has long admonished lower courts that, in applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must keep in mind that their function is not to decide factual issues *de novo*. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Rule 32(c)(1) of the Federal Rules of Criminal Procedure requires that when defendants allege any factual inaccuracy in the presentence report, the court should either make a finding resolving the controverted matter or determine that it will not consider the controverted matter in sentencing the defendant. The requirement "protects a defendant's due process right to be sentenced on the basis of accurate information." *United States v. Chaikin*, 960 F.2d 171, 175 (D.C. Cir. 1992).

The quantity of drugs attributed to the defendant in a narcotics trafficking case is frequently the single most important determinant of the length of the defendant's sentence under the Guidelines. *United States v. Brothers*, 75 F.3d 845, 849 (3d Cir. 1996); *Untied States v. Sepulveda*, 15 F.3d 1161, 1196-98 (1st Cir. 1993), *cert. denied*, 512 U.S. 1223 (1994). Thus, it is of vital importance that the information relied upon in calculating the defendant's base offense level have "sufficient indicia of reliability to support its probable accuracy." USSG § 6A1.3(a).

I. THE SEVENTH CIRCUIT'S DECISION DEPARTS FROM ITS PRIOR HOLDINGS

The Seventh Circuit has, on numerous occasions prior to its decision in this case, stated that "it is not this court's role to make the factual determinations necessary to support a sentencing calculation; that is a task for the district court." *United States v. Austin,* 54 F.3d 394, 405 (7th Cir. 1995), citing *United States v. Tai*, 994 F.2d 1204, 1212 (7th Cir. 1994) ("*Tai I*"); *United States v. Tai*, 41 F.3d 1170, 1175 (7th Cir. 1994) ("*Tai II*") ("this Court [will] not sift through the record to make the factual findings necessary to support the district court's determination"); *see also United States v. Sullivan*, 916 F.2d 417, 420 (7th Cir. 1990) (vacating sentence and remanding to district court where district court failed to adequately explain its reasoning for its denial of a two point reduction for acceptance of responsibility).

In *Austin*, the district court gave defendant a four level enhancement for being the organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. The court focused solely on the "five or more participants" prong for purposes of the enhancement

and made no finding in the record as to the "otherwise extensive" prong. 54 F.3d at 404. The Seventh Circuit vacated the enhancement and remanded the case. The government argued that the court could affirm on the basis of the "otherwise extensive" prong, even though the focus at sentencing was on the "five participants or more" prong, since sufficient support could be found in the record. The court refused to do so, stating that "sentencing decisions, like most fact-sensitive inquiries, are best left to the trial court." *Id.*

The present case presents the exact same scenario as in *Austin*. At sentencing, the district court judge focused on Griffin's testimony to arrive at his finding that there was over 150 grams of cocaine attributable to Palmer. That testimony was deemed unreliable by the Seventh Circuit. The court, as it did in *Austin*, should have remanded for further findings. Simply because there is "supportable" evidence in the record for 50 to 150 grams is not enough, especially where, as here, the trial court was — at that time — completely silent as to the credibility of those witnesses. *See also Sullivan*, 916 F.2d at 420 (remand necessary to determine whether two point reduction should be given where district court stated it relied on entire record for its denial of the reduction, but only articulated one factor on the record); *United States v. Patel*, 131 F.3d 1195, 1202 (7th Cir. 1997) (three point enhancement under § 3B1.1(b) vacated and remanded where district court judge was silent on its findings to support enhancement and made no reference to the PSR which contained supporting evidence).

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE LAW IN OTHER CIRCUITS

Generally, other circuits have remanded for factual findings where the court failed to explain its reasons for an enhancement of a defendant's base offense level (or denial of a reduction of the offense level). *See, e.g., United States v. Santiago*, 906 F.2d 867, 872 (2d Cir. 1990) (remand necessary for reconsideration of whether defendant entitled to two level reduction for acceptance of responsibility, where one ground considered was improper and district court failed to articulate another ground for denial, though record indicated that such ground existed); *United States v. Miele*, 989 F.2d 659, 667-68 (3d Cir. 1993) (findings regarding addict-informant's credibility as witness or reliability of various drug quantities were required before informant's information could be used to attribute drug quantity estimates to defendant); *United States v. Melton*, 930 F.2d 1096, 1099 (5th Cir. 1991) (declaring that "we cannot perform the appellate function" unless the sentencing court articulates the factual basis for an adjustment); *United States v. Carter*, 219 F.3d 863, 867-68 (9th Cir. 2000) (vacation of sentence and remand for resentencing required where defendant challenged facts in PSR relevant to role enhancement and district court neither resolved the disputed issues nor indicated that they were irrelevant).

At least three circuits, however, have addressed whether an appellate court could make factual findings as to drug quantities. The Eighth Circuit addressed this very issue in *United States v. Candie*, 974 F.2d 61, 65 (8th Cir. 1992). In *Candie*, the district court announced that "there was in excess of 50 kilograms of cocaine . . . which would carry an offense level of 36." The court, however, did not explain

whether it credited the testimony of the co-conspirator. 974 F.2d at 65. A report of the court's findings as to objections to the PSR indicated that the court based its finding on the testimony of the co-conspirator. The Eighth Circuit vacated the sentence and remanded for a credibility finding regarding the co-conspirator's testimony as to drug quantity. *Id.*; *see also United States v. Randolph*, 101 F.3d 607, 609 (8th Cir. 1996), citing *Candie*.

Likewise, in *United States v. Lee*, 68 F.3d 1267 (11th Cir. 1995), the Eleventh Circuit was faced with a situation where the district court determined the drug quantity attributable to a defendant based on a co-conspirator's hearsay statements. The statements were given to a DEA agent prior to trial. 68 F.3d at 1275. The district court judge, based on the statements, found the defendant responsible for more than 15 kilograms of cocaine. The Eleventh Circuit remanded the case for specific findings as to the reasons for relying on the co-conspirator's statements. *Id.* at 1276. In so holding, the Eleventh Circuit reasoned, "specific findings on [the witnesses's] credibility are necessary before the district court can use this evidence as a basis for determining the base offense level in order to sentence [the defendant]."*Id.* (parenthesis added).

Similarly, the Fourth Circuit addressed a case where the district court did not expressly or implicitly rely on the PSR at the sentencing hearing. In *United States v. Williams*, 152 F.3d 294 (4th Cir. 1998), the district court concluded at sentencing that defendant was responsible for 13,000 kilograms of marijuana equivalency when, in fact, the police only found in defendant's possession around 58 kilograms of marijuana equivalency. At sentencing, the judge indicated that he was not adopting the PSR in its entirety. 152 F.3d at

302. Because the lower court did not adopt the PSR at the hearing and no implicit adoption could be found, the Fourth Circuit remanded for adequate findings. *Id.*

Candie, *Lee* and *Williams* are directly on point with the present case. Like the aforementioned cases, the district court made no determinations as to the credibility and reliability of the testimony of Deal and Branscomb whatsoever. Nor did it make any findings as to the amount of drugs attributable to Palmer in view of this evidence. The courts in all three cases had the opportunity to make the finding themselves, but refused to do so. Instead, the courts appropriately left the determination in the hands of the person in the best position to judge the credibility of witnesses, the trial judge.

The Tenth Circuit has followed the jurisprudence of the Seventh Circuit's prior holdings outlined in Section I above. In *United States v. Spears*, 197 F.3d 465, 469 (10th Cir. 1999), the district court concluded that defendant was an organizer or leader of a conspiracy under U.S.S.G. § 3B1.1(a). In so finding, the trial court discussed the sources of evidence used to reach its decision, but did not provide a factual basis for its conclusions. 197 F.3d at 469. The Tenth Circuit vacated the defendant's sentence and remanded to the district court for more specific fact finding, stating "even if the record evidence overwhelmingly supports the enhancement, appellate fact finding cannot substitute for the district court's duty to articulate clearly the reasons for the enhancement." *Id.; see also United States v. Roberts*, 14 F.3d 502, 523 (10th Cir. 1993), citing *Tai I*, 994 F.2d at 1212.

III. THE SEVENTH CIRCUIT'S DECISION VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS TO FAIR SENTENCING

By finding that 112 grams is "supportable" by the testimony of Deal and Branscomb, two admitted drug addicts and government informants, the Seventh Circuit relegated Palmer to a base offense level of 37 and a sentence of 405 months in prison. Had Deal's and Branscomb's testimony been properly found to be inherently unreliable (as explained more fully below), Palmer would have received a base offense level of 29.[3] Thus, Palmer would have been eligible for a sentence range of 140-175 months, or approximately 19-22 years less than the sentence he actually received.

Aside from the clear seriousness of the decision as it relates to Palmer's sentence, the case sets a bad precedent. It allows the appellate court to make factual findings and credibility determinations *de novo*, while at the same time ignoring precedent establishing the need to view the testimony of informant addicts with heightened scrutiny to ensure its reliability as a matter of due process.

It is axiomatic that a defendant has a right to be sentenced on the basis of reliable information. *United States v. Lanterman*, 76 F.3d 158, 160 (7th Cir. 1996); *see also, e.g., Chaikin*, 960 F.2d at 175; *United States v. Hanono-Surujun*, 914 F.2d 15, 20 (1st Cir. 1990); *Carter*, 219 F.3d at 866. The Seventh Circuit has consistently remanded cases where inconsistent testimony is given by addict-informant witnesses

3. If the testimony were held to be unreliable, Palmer would be sentenced based on 4.7 grams as charged in the indictment, which translates to a level of 24 under the Guidelines. When added to all of his other enhancements he would be at a base offense level of 29.

and one set of such inconsistent testimony is credited over another without any reasons given as to why the chosen estimate is more reliable. *United States v. McEntire*, 153 F.3d 424, 436 (7th Cir. 1998); *United States v. Acosta*, 85 F.3d 275, 281-83 (7th Cir. 1996); *United States v. Beler*, 20 F.3d 1428 (7th Cir. 1994).

In *Beler*, the district court relied on two affidavits from a government witness and the trial testimony of a second witness to support a relevant conduct finding as to drug quantity. *Id.* at 1430. The first affidavit from the government witness reported a larger amount of drugs than the second affidavit, the latter of which the district court relied upon. *Id.* The court held that Guideline § 6A1.3(a)'s reliability standard must be rigorously applied. *Id.* at 1433. The court further noted that "although [defendant] failed to come forward with his own alternative estimate of drug quantity, he did succeed in discrediting [the witness'] estimate by pointing to [the witness'] inability to make a similar estimate of drug quantity at trial." *Id.* In addition, the witness in *Beler* was a government informant as well as a drug addict during most, if not all, of the relevant time period. In remanding the case, the court noted:

> [W]e believe the district court should have subjected any information provided by [the witness] to special scrutiny in light of his dual status as a cocaine addict and government informant. Such a heightened standard of scrutiny is consistent with the rule adopted by a number of other circuits when considering a drug quantity estimate provided by an informant who has a history of drug addiction.

Id. In *Beler*, the Seventh Circuit found that the district court clearly erred when it did not subject the inconsistent evidence to "the searching inquiry we must require. . . ." *Id.* at 1435.

Similarly, in *McEntire*, the Seventh Circuit followed the pronouncements set forth in *Beler* to vacate a defendant's sentence. In *McEntire*, the district court relied on witness testimony containing conclusory estimates of drug quantity and adopted the lower of four different estimates given by the witness, despite an affidavit disavowing any ability to estimate the amount of drugs the defendant received. 153 F.3d at 437. The district court did not explain its finding. *Id.* This Court held that

> the record in this case leaves us unconvinced that the district court conducted a sufficient searching inquiry into the contradictory evidence. [The witness's] testimony was uncorroborated, and the district court did not provide a rationale for believing one set of contradictory statements over another. The sentence imposed on the basis of that evidence, therefore, cannot stand.

Id.

Other circuits have weighed in on this issue as well. In *Miele*, 989 F.2d at 666-67, the Third Circuit vacated and remanded a drug quantity sentence based on the testimony of an addict-informant witness. The witness's testimony was strife with inconsistencies as to the quantity of drugs attributable to the defendant, to the point where the witness finally stated, "I can only theorize by looking at the quantity." *Id.*, *accord*, *United States v. Medford*, 194 F.3d 419, 424 (3d Cir. 1999). Similarly, in *United States v. Simmons*, 964 F.2d 763 (8th Cir. 1992), the Eighth Circuit vacated and remanded a drug quantity-based sentence because the court found that it may have been based on the testimony of an addict-

informant whose memory was impaired from a history of cocaine addiction. *Id.* at 776. Finally, in *United States v. Robinson*, 904 F.2d 365 (6th Cir. 1990), *cert. denied*, 498 U.S. 946 (1990), the Sixth Circuit held that a sentencing court's drug quantity finding was clearly erroneous because it was based on the estimates of an addict-witness who admitted that she was a heavy drug user during the time period at issue, and that she was guessing at amounts. *Id.* at 371-72, *accord*, *United States v. Gibbs*, 182 F.3d 408, 444 (6th Cir. 1999).

In this case, the Seventh Circuit did exactly what it (and other appellate courts) has proscribed the lower court from doing on numerous occasions — made a factual determination of drug quantity based on conclusory, unexplained, and inconsistent testimony. A closer examination of the record shows the need for re-sentencing rather than re-calculation. For instance, the PSR attributes at least 11.31 grams to Deal's testimony from activities prior to May 5, 1998. (PSR ¶ 7). No explanation is given as to how Deal or the probation officer arrived at the amounts, nor was any explanation given by Deal at sentencing. The Seventh Circuit itself has, in past cases, been unwilling to do what it has done in this instance — rely on pure speculation to credit estimates absent a reliable evidentiary basis supporting the probation officer's assumption as to the amounts given. *See United States v. Howard*, 80 F.3d 1194, 1205 (7th Cir. 1996), citing *United States v. Henderson*, 58 F.3d 1145, 1152 (7th Cir. 1995).

Moreover, in the PSR, Branscomb is attributed to having witnessed Palmer cook up one-half ounce of crack cocaine (PSR 17). However, despite being pressed to reiterate his previous testimony, Branscomb explicitly stated at the sentencing hearing that he did not know how much crack

cocaine was cooked up.[4] (App. B, p. 13a.) At no point during the hearing did he mention the one-half ounce quantity as attributed in the PSR.

Similarly, Deal's testimony at the sentencing hearing can be shown to be unreliable. First, Deal made various bare estimates as to drug quantity, and neither the government nor the judge made any effort to explain how he arrived at these quantities. In fact, the evidence shows that his estimates are grossly miscalculated, if reliable at all. For instance, Deal stated in the PSR that he purchased from Palmer one-sixteenth portion of crack on three occasions prior to May 5, 1998, to which 1.77 grams was attributed to each transaction by the probation officer. (PSR 7.) However, on *every single occasion* in which Deal (a total of six different times by the government's calculation) purchased a one-sixteenth portion of crack which was added as relevant conduct, the amount was measured out to no more than .9 grams of crack. (PSR 8, 9, 11, 12.) Moreover, the government doubled an amount of .9 grams of crack based on a May 5, 1998 transaction. (PSR 8.) That transaction was one of the underlying offenses, for which Palmer was convicted, yet was counted again as relevant conduct. Such inconsistencies require an explanation and explicit findings by the trial judge.

More importantly, the crucial evidence in the record that belies the estimates given by Deal can be found in the June 25, 1998 tape-recorded conversation between Deal and Palmer. In the PSR, Deal is credited with having seen one ounce of crack (28.35 grams) in Palmer's possession.

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4. Further, there is no indication of when this crack was supposedly cooked up. Under the Seventh Circuit's March 27, 2001 ruling, this drug amount may well be improper for consideration similar to the quantity testified to by Warren Griffin.

However, Palmer is recorded on tape as having said that he had in his possession only five grams of crack. (App. E, p. 22a.) At that time, Palmer had no knowledge that the conversation was being recorded, and thus no motive to lie about the drug quantity. Such conflicting evidence clearly calls into question Deal's credibility and his ability to make a reliable estimate. By sentencing Palmer for the full amount as stated in the PSR, which the district court did not expressly adopt, the Seventh Circuit made a credibility determination that it has left to the district courts on numerous occasions, especially where, as here, the trial court was required as a matter of law to subject the testimony to a more searching inquiry due to the fact that the witnesses were admitted drug addicts and government informants. *McEntire*, 153 F.3d at 436; *Beler*, 20 F.3d at 1430-34.

By circumventing its own holdings, the Seventh Circuit has set up a precedent whereby the appellate court *can make a fact finding determination without a defendant's due process rights being protected.* The appellate court, by authority of this *published* decision, may now make *sua sponte* factual findings over a defendant's objections without providing specific rationales for its decisions. *See United States v. DePriest*, 6 F.3d 1201, 1213 (7th Cir. 1993) (sentence vacated where the defendant was sentenced for the entire quantity of drugs related to a conspiracy charge without a specific factual determination supporting the sentence); *see also* Fed. R. Crim. P. 32(c)(1); 18 U.S.C. § 3553(c). Moreover, the Seventh Circuit's decisions turns longstanding jurisprudence on its head. On numerous occasions, the Seventh Circuit has held that the clearly erroneous standard applies to estimates of drug quantities for sentencing purposes because "the district court, as a trier of fact, not only has the authority, but is in the best position, to determine the amount

of narcotics attributable to [defendant]." *United States v. Pitz*, 2 F.3d 723, 727-28 (7th Cir. 1993); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994); *United States v. Mancillas*, 183 F.3d 682, 701 n.22 (7th Cir. 1999). Such deference is given to the trial court because he or she has had the best opportunity to observe the verbal and non-verbal behavior of the witnesses focusing on the subjects' reactions, their facial expressions, attitudes, tones of voice, eye contact, posture and body movements, as well as confused or nervous speech patterns in contrast with merely looking at the cold pages of an appellate record. *United States v. Tolson*, 988 F.2d 1499, 1497 (7th Cir. 1993).

The rationale for the deference to the original finder of fact is not only because of the trial judge's superior position to make determinations of credibility, but also because the trial judge's major role is the determination of fact, thus creating a level of expertise through experience that the appellate court does not have. *Anderson*, 470 U.S. 574. If the Seventh Circuit's decision in this case were allowed to stand, the parties to a case on appeal would, in essence, be forced to state their case at least three more times. *Id.* at 575. The initial hearing on the merits should be the "main event," not the "tryout on the road." *Anderson*, 470 U.S. at 575, citing *Wainwright v. Sykes*, 433 U.S. 72 (1977).

In improperly conducting what amounted to a *de novo* weighing of Deal's and Branscomb's testimony in this case, the Seventh Circuit has created precedent that would allow it to find drug quantity estimates, and ultimately sentence a defendant, without the benefit of a trial court's determination of the facts. At the same time, the Seventh Circuit's decision serves to supplant the trial court's fact finding function, while potentially diverting valuable judicial resources.

Anderson, 470 U.S. at 575. Furthermore, the appellate court would ignore many of the verbal and non-verbal actions that are so important in determining credibility of witnesses. Evidence that is contradictory on its face is "the prototype of unreliable evidence" that the Seventh Circuit has consistently held provides an inadequate basis for calculating a defendant's base offense level under the Guidelines. *Acosta*, 85 F.3d at 283; *Beler*, 20 F.3d at 1436. For the Seventh Circuit to make a decision as to drug quantity estimates without the benefit of a hearing to resolve the inconsistent testimony or to determine the reliability of the estimates upon which it relied undermines the defendant's due process right to be sentenced based upon information with a "sufficient indicia of reliability to support its probable accuracy. USSG § 6A1.3(a); *see McEntire*, 153 F.3d at 436-37; *Beler*, 20 F.3d at 1436; *Miele*, 989 F.3d at 663-64; *Simmons*, 964 F.2d at 776; *see also Robinson*, 904 F.2d at 371-72. This is especially so where, as here, neither the district court nor the Seventh Circuit, subjected either witness's testimony to a heightened level of scrutiny as a number of circuits, including the Seventh, have held. *See Beler*, 20 F.3d at 1435; *Miele*, 989 F.2d at 666-67; *Simmons*, 964 F.2d at 776; *Robinson*, 904 F.2d at 371. By weighing evidence on a cold record, and by ignoring its own mandate to specially scrutinize testimony from addict informants, the Seventh Circuit subjects defendants, such as Palmer, to an unwarranted risk of excessive sentences based upon unreliable testimony. The Seventh Circuit's position that it may make a factual determination as to drug quantity *de novo* warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MARCH 27, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 00-2945

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD PALMER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:99-30228-01-GPM —
G. Patrick Murphy, *Chief Judge.*

ARGUED MARCH 7, 2001 — DECIDED MARCH 27, 2001*

Before DIANE P. WOOD, EVANS, and WILLIAMS, *Circuit Judges.*

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* This appeal was originally resolved in an unpublished order of March 27, 2001. Subsequently, we granted a request to convert the order to a published opinion.

Appendix A

PER CURIAM. Reginald Palmer was convicted on three counts of distributing crack within 1,000 feet of a playground. He appeals, challenging only the very lengthy prison sentence — 475 months — he received.

In May and June 1998, Palmer sold small amounts (.9 grams, and 1.9 grams twice) of crack to Keenan Deal who was — much to Palmer's later surprise — cooperating with authorities. The sales occurred within 1,000 feet of Virginia Park, an East St. Louis, Illinois, playground. A superseding indictment charged Palmer with three counts of distributing crack, 21 U.S.C. § 841(a)(1), and three parallel counts of doing the deals within 1,000 feet of a playground, *id.* § 860(a). Palmer entered guilty pleas to all six counts without a plea agreement, but because the distribution counts were lesser-included offenses of the more serious "playground" counts, *see Williams v. United States*, 150 F.3d 639 (7th Cir. 1998), the district court entered judgment only on the latter.

In preparing the presentence investigation report (PSR), the probation officer calculated Palmer's relevant conduct using information from Deal and from federal agents who interviewed several sources, including Palmer's former neighbor, Robert Branscomb, and Warren Griffin, a "governor" of the Gangster Disciples gang. The probation officer concluded that Palmer's relevant conduct totaled 353 grams[1] of crack: 98 grams from Deal, 14 grams from Branscomb, and 241 grams from Griffin. Palmer objected but, for the most part, provided only conclusory responses

1. We have rounded the amounts off.

denying certain transactions or objecting to particular witness statements. He did, however, specifically object to any drugs involving Griffin, arguing that those activities were unreliable and too remote in time to be included in his relevant conduct under the sentencing guidelines.

At the sentencing hearing, Deal described five previous occasions when he bought 1.7 grams of crack from Palmer. He also testified about several more ounces of crack he saw Palmer carrying during those transactions. Branscomb testified that Palmer sold crack outside Branscomb's home "about every day during the year of 1998 and 1999." Finally, the government called a deputy U.S. marshal who had previously interviewed Griffin about his contacts with Palmer during 1996. Griffin, according to the marshal, had "taught [Palmer] the drug trade." Griffin allegedly told the marshal he received two ounces of crack from Palmer and had seen him in possession of seven or eight ounces of crack that Palmer and a friend had cooked from powder.

Palmer offered no direct evidence to support his objections to the PSR. He did, however, argue that a substantial portion of the relevant conduct amount, particularly the quantity attributable to him by reason of Griffin's statements, was based on hearsay and should not be included in the final calculation. Palmer suggested that the total amount of crack was only 135 grams, not 353.2, although it is unclear how he arrived at this calculation. The district judge determined:

> There is a substantial, rational basis for attributing more than 150 grams to the defendant. Now, the

> Government has an exact 353.2 grams. I am not prepared to say that they are exactly correct, but I am prepared to say that there is substantially more than 150 grams that must be attributed to the defendant under the evidence that is before me.

We review for clear error the district court's calculation of the drug quantity attributed to Palmer as relevant conduct. *United States v. Huerta*, 239 F.3d 865, 875 (7th Cir. 2001). In doing so, we refrain from second-guessing the district judge, *United States v. McEntire*, 153 F.3d 424, 431 (7th Cir. 1998), and must affirm unless we are left with a "definite and firm conviction that a mistake has been committed," *Huerta*, 239 F.3d at 875 (internal quotations and citation omitted).

Palmer first argues that the district court failed to make a specific finding of drug quantity; the judge's determination of "more than 150 grams" is legally insufficient, Palmer suggests. The government argues that Palmer forfeited this argument, and others, by failing to properly object at sentencing, and accordingly our review should only be for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Krankel*, 164 F.3d 1046, 1055 n.3 (7th Cir. 1998). We reject this argument and find the defendant's objections adequate to trigger clear error, rather than plain error, review.

Recognizing the importance of drug quantity in sentencing, we require that a sentencing court make an explicit drug-quantity finding and explain how it arrived at the sentence. *McEntire*, 153 F.3d at 435. The district court here specified only "more than 150 grams," but a more exact

sum was not necessary given that anything between 150 and 500 grams would have resulted in the same sentencing range. But is the "more than 150 grams" finding supportable?

This case presents a situation we have been encountering with increased regularity. A defendant pleads guilty to dealing in small amounts of crack — here, Palmer sold only a total of 4.7 grams to Deal in the three transactions specifically charged in the indictment — but then the presentence report lists huge amounts of crack as "relevant conduct," which dramatically ratchet up the resting point on the sentencing guideline grid. We conclude here that the 98 grams attributed to Palmer through Deal and the 14 grams attributed to him through Branscomb, though dwarfing the amounts involved in the actual sales, are supportable based on our review of this record. But we have serious misgivings about the huge amount, 241 grams, piled on Palmer through a U.S. marshal's recitation of a statement given to him by Griffin, who did not personally testify (he took the Fifth) at the sentencing hearing. Our doubts about Griffin's evidence, inaccurately presented to us by the government as Griffin's "testimony," gives us great pause even if only a portion of it is needed to move Palmer over 150 grams. First, the matters related by Griffin are remote in time — over 2 years old — to the sales to Deal that form the basis for the counts of conviction. Second, the district court did not make any specific findings as to Griffin's reliability, which probably is understandable given the fact that the way his "evidence" was presented affords no basis for determining that what he told the marshal was true or accurate.

Accordingly, given our serious concerns about the Griffin evidence, we determine that a finding of "more than 150 grams" on the basis of this record is clearly erroneous. The record, however, does support, for relevant conduct purposes, a sentence within the range of 50 to 150 grams of crack. Accordingly, the sentence is VACATED and the case REMANDED to the district court for resentencing. At resentencing, no further proceedings will be necessary, other than an adjustment of the sentence, if the district court elects to sentence Palmer on the basis of 50 to 150 grams. To go beyond that level, more proceedings regarding Griffin and a better record on the reliability of the information he offered will be required.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF SENTENCING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JULY 24, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 99-30228

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REGINALD PALMER,

Defendant.

July 24, 2000

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE G. PATRICK MURPHY
UNITED STATES DISTRICT JUDGE

* * *

[10] . . . you received four years probation?

A Yes, I did.

Q And as part of that probation were you ordered to undergo drug treatment?

A Yes, I did.

Q Do you have a 1997 conviction for burglary to a motor vehicle?

A Yes, I do.

Q And for that conviction were you sent to the Illinois State Penitentiary.

A Yes.

Q And, Mr. Deal, do you have a 1998 conviction for theft over $300?

A Yes.

Q And for that conviction were you also sentenced to a term of imprisonment?

A Yes.

Q Are you currently on parole?

A Yes.

Q And have you been promised anything for your testimony here today?

A No.

Q In the course of this investigation, Mr. Deal, did you agree to make some, what we call controlled purchases of crack cocaine from your cousin, Reginald Palmer?

Appendix B

[11] A Yes.

Q And for your services were you paid?

A Yes.

Q Were you provided gas, for example, gas to get to and from where you need to be?

A Yes.

Q And witness fees?

A Yes.

Q And do you recall that the total amount of payments you received in the course of this case to be about $525?

A Yes.

Q Mr. Palmer, or excuse me, Mr. Deal, you understand that Mr. Palmer has pled guilty to the indictment; is that correct?

A Yes.

Q And those were three of the buys that you made from him?

A Yes.

Q And do you recall those buys that you worked with the police being May the 5th of 1998, May the 27th of 1998? Let me double-check by dates and June the 25th of 1998?

A Yes.

Q On each of those occasions, Mr. Deal, were you wearing a recording device?

A Yes.

Q And have you had an occasion to listen to the tape recordings that were made by you and your conversations with Mr. . . . .

* * *

[18] A Sell drugs for him and stuff like that.

Q And would this be crack cocaine?

A Yes.

Q On this date did you actually go to Branscomb's apartment there looking for Reginald Palmer?

A Yes, I did. He sent me around the corner to where he was.

Q Where was Mr. Palmer? Out on the street that day or what?

A Right on the street around the corner from Mr. Branscomb's, on Brady.

Q And then you met with Mr. Palmer on the 27th?

A Yes.

Q And you made a purchase from him that day?

A Yes, I did.

Q Did you have occasion on the 27th to see any additional amounts of crack cocaine?

A Yes.

Q And can you estimate for the court what you saw?

A I can't estimate, but it was quite a bit that he had.

Q Do you know whether it was as much as an ounce?

A Close to it.

Q Close to an ounce?

A Yes. It was quite a bit.

Q You said it was quite real?

* * *

[31] THE COURT: Your Honor, if I could have just a moment, please.

THE COURT: I have a question while you're checking. Do you know who hit you?

WITNESS: No, I do not.

THE COURT: You couldn't recognize them?

WITNESS: No. It was at nighttime.

THE COURT: Go ahead.

MS. MORRISSEY: Thank you, Your Honor. That's all I have.

THE COURT: Any cross examination?

CROSS EXAMINATION

QUESTIONS BY MR. ROOSEVELT:

Q Mr. Deal, when did your crack use begin?

A Maybe probably about 19.

Q How old are you now?

A 31.

Q So you have been using for 12 years?

A Yes.

Q And you were asked if you were addicted; is that correct? You are addicted to crack cocaine?

A Yes.

Q With what frequency would you use it?

A What do you mean?

Q How often would you use it?

* * *

[44] Q They wouldn't run him off or place him under arrest?

A No.

Q The times that he cooked crack in your apartment, can you estimate for the Court about how much it was on each of those occasions?

A It was a small amount. It wasn't much. I don't know how much it was, but it was a small amount.

Q Okay. Can you tell me — can you give us any idea, like was it less than an ounce, less than half an ounce, more than half an ounce, anything like that?

A Oh, it was less than a half an ounce, I know.

Q Less than half an ounce?

A Yes.

Q Was it as much as a quarter of an ounce?

A No, it wasn't.

Q You don't think it was?

A I'm sorry. I'm not sure.

Q All right. Were there occasions when Mr. Palmer would use your apartment to package crack cocaine?

A Just that one time that I was sitting in the living room talking to my oldest son, and he walked in with a couple of guys, and they started cutting it up. I told them they couldn't do that, that they had to leave. When they went outside, he gave this other guy a gun to shoot me with, and my older son stood in front of me, and that's the only reason he didn't, and . . . .

* * *

[53] A When I was about 22. I was in the service.

Q Have you used it since?

A Yes, I have.

Q How often?

A Every day.

Q You're how old now?

A I'm 50 years old now.

Q You've used it every day for nearly the last 30 years?

A No, just on and off.

Q What other drugs have you used?

A None.

Q Have you used crack cocaine?

A No. I haven't.

Q Used any form of cocaine?

A No.

Q The only drug you use is heroin?

A Yes.

Q In 1998, you used heroin?

A Yes.

Q What effect does it have on you when you use it?

A This is more a downer, like a sedative.

Q Were you using heroin during these times that you're describing talking with Money or Reginald Palmer in 1998 and 1999?

A No. Sometimes, but not all the time.

* * *

Appendix B

[75] . . . which he was never formally charged, never tried and never found guilty of beyond a reasonable doubt. That's the whole concept of relevant conduct. Now, lawyers have made powerful arguments in all the courts, but the bottom line is the United States Supreme Court has said that this is constitutional, and if the Government can prove by a preponderance of the evidence certain relevant conduct, that is conduct that is substantially related to the offense charged, then it comes in at sentencing. What some people find even more peculiar, the rules of evidence are relaxed at sentencing, so all of the safeguards associated with the federal rules of evidence and common law evidence do not obtain. Of course, that's what we have here.

Given the state of the law and the evidence there is before the Court as to the defendant's objection on relevant conduct, it's overruled, and I adopt the probation officer's position. There's nothing particularly unreliable about Griffin's testimony. The fact of the matter is the Government's been using it for sometime. They have been overhearing him while he was in prison, and they knew what he was doing before he got out of prison. They had been following him, and for all we know, they're probably still using it.

There is a substantial, rational basis for attributing more than 150 grams to the defendant. Now, the Government has an exact 353.2 grams. I am not prepared to say that they are exactly correct, but I am prepared to say that there is [76] substantially more than 150 grams that must be attributed to the defendant under the evidence that is before me. That is what is important in this case.

Appendix B

Now, the same thing on the firearm. I am not at liberty to ignore Mr. Branscomb's testimony. It could be said that, well, he's a heroin addict. Well, of course, everybody that testifies in these cases, it seems like, is under some type of disability or the other. Some of them do have a history of drug abuse, and most of them have done time in prison. I listened to them testify. It did not seem irrational. There was no particular motive for him to testify as he did, other than just telling the truth and wanting to get along with the Government, and hopefully keep Mr. Palmer off of his back. So I find that the defendant is good for the 2 points that come with the firearm. He's going to get it.

Now, finally, obstruction of justice. There's a lot of peculiar things about this case, and I'm not sure peculiar is the right word, but the fact of the matter is we got ready to have a trial. I was prepared to have a trial. As soon as the witness was called and the defendant saw he was going to plead, he immediately pled guilty.

Now, we have a young man, Mr. Deal, who comes in here, who is a cousin, and it's possible, this being East St. Louis, that it was just fortuitous that he was jumped and beaten to within an inch of his life Thursday, but it's not likely. . . .

* * * *

APPENDIX C — EXCERPTS FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JULY 24, 2000

[commencing at page 7]

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the Court:

Total Offense Level: 39

Criminal History Category: V

Imprisonment Range: 360-480 months

Supervised Release Range: 6 years

Fine Range: $20,000.00 to $9,000,000

* * * *

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 14, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 14, 2001

Before

Hon. Diane P. Wood, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

No. 00-2945

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD PALMER,

Defendant-Appellant.

Appendix D

Appeal from the United States District Court
for the Southern District of Illinois.

No. 99 CR 30228

G. Patrick Murphy,
Chief Judge.

ORDER

On April 10, 2001, the defendant-appellant filed a petition for rehearing. All the judges on the original panel have voted to deny a rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E — EXCERPTS FROM RE-SENTENCING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED OCTOBER 29, 2001

IN THE DISTRICT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 99-30228-GPM

UNITED STATES OF AMERICA,

Plaintiff,

VS.

REGINALD PALMER,

Defendant.

Re-Sentencing

BE IT REMEMBERED AND CERTIFIED that heretofore on **10/29/01**, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, **HONORABLE *G. PATRICK MURPHY***, United States District Judge presiding, the following proceedings were recorded by mechanical stenography, transcript produced by computer.

* * *

Appendix E

[4] MRS. MORRISSEY: No, your Honor.

MR. ROOSEVELT: Yes, your Honor, if I may.

THE COURT: All right.

MR. ROOSEVELT: At whatever point the court — we I believe first, Judge, that the calculations of total offense level 37 with a range found of 324 to 405 months and a criminal history category of V is, as you read the Seventh Circuit's opinion, where they're directing the court to go. And so I think that is first off important to note. The defendant however, continues regarding, and if I may, continued the objection that reexpressed earlier at the original sentencing as to witnesses Deal and Branscomb. We had commented upon them at that time as they're simply not being credible. Mr. Branscomb, 30-year drug addict of heroin use who testified at sentencing that he really didn't say what drug amounts there were that were involved in these transactions. Mr. Deal subject to the same infirmities with the use of drugs, crack cocaine, for a substantial period of time. He could not estimate the amount on the May 27th 1998 transaction. In his testimony on May 5th 1998 said the amount purchased from Reggie was simply that he saw was simply the amount purchased, nothing more. On the June 23rd incident it was eight-tenth of a gram. On June 25 he bought a 16th of an ounce at Molly's hamburger or in that area. Testified regarding it. Attributed half to an ounce to Mr. Palmer. Yet at the same time this was argued [5] before at sentencing. Palmer had a taped statement of the transaction involved in which Deal asked Palmer what amount was there and Palmer says five grams. We think that is the best evidence was Palmer's statement of the amount.

And I had stated at the sentencing and restate our position that it was under 35 grams. The Seventh Circuit talked about a statement of counsel attributing 135 grams and the Seventh Circuit I think in their decision said it was somewhat mistified as to how that was come up with and, in fact, under 35 grams is the amount we had stated and do state here as part of our objection, your Honor, if we may.

Also on the specific offense characteristics, the original presentence report didn't make an adjustment under specific offense characteristics. That adjustment was made at the original sentencing for the use of a dangerous weapon. We objected then. We continue our objection. That is the specific offense characteristic addition of two levels does occur in the second addendum to the presentence report supplied to us this morning and it appears there. For that reason we make that objection.

And those who would be the nature and extent of our objections that we'd like the court to consider. Certainly the June 25th tape could be made available for review but their Palmer says, importantly I think that, estimates that weight to be way under what deal was ascribing to the defendant. Thank [6] you, your Honor.

THE COURT: Mr. Roosevelt, I appreciate your comments and I think they're serious. But the matter is before me on remand and I'm not in a position to review what the court of appeals has passed on. I've never been accused of being overly modest or particularly shy, but I don't think I've got a license to review the court of appeals. And it says here that, "we determine that the finding of more than

150 grams is clearly erroneous. The record, however, does support for relevant purposes a sentence within the range of 50 to 150 grams of crack." It's what they say. At re-sentencing no further proceedings would be necessary under re-sentencing. If the court elects to go beyond that, I mean, we have to do more. I've asked the U.S. attorney and she says no. So we're at 50 to 150. I appreciate what you're saying and I have to say I'm — you know, when it comes to what is and isn't reliable in these cases I'm still rather mystified.

I always give the example that we could take any of these people that were involved in this case, any one of them. If they came to your front door and said, I want to sell you a vacuum cleaner, they would be shot on sight because they're unreliable. Would anybody seriously say to Mr. Griffin or any of these other witnesses, well, just come on in. Let's have a cup of coffee. Maybe we could have a little ice tea and watch CNN. Well, of course, you wouldn't. You'd shoot 'em on sight. . . .

* * *

[10] . . . As I say, there is in a typical case — and this is only typical in that the record of everyone including the defendant is worse but that hardly stands out. It's almost prototypical in a crack cocaine case. And there's just — the personalities that are involved can hardly be said to be reliable at least in the sense that that's ordinarily understood. So I say that. And we do the best that we can with what we have.

The court of appeals finds that it's between 50 and 150 grams, that that's supported by the evidence, and that's as

good as what — as we're ever going to get. The court of appeals did not rely upon, or allow themselves to be misled, by what the defense lawyer said or the government's characterization of the evidence. It's apparent that they sat down and read the record in this case and they've come up with an order and that's that. So there's no particular problem there. The court sentenced the defendant at the high end because I thought that's what he ought to have, and I still do. This is — Mr. Palmer has a bad record. Anybody can read it and see what it says. I'm not going to go through it again. It wouldn't serve any purpose. I think I had it right the first time on what his record is.

And I wanna say this right up front. I don't believe that these sentences have what is called general deterrence. I don't think the people out there on the street give one wit whether Reginald Palmer got 300 months or 400 months. If we . . . .

* * * *